

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
MISSION MORTUARY)
)
For Review of a Determination of the)
Division of Clean Water Programs,)
State Water Resources Control Board,)
Regarding Participation in the Under-)
ground Storage Tank Cleanup Fund.)
Our File No. UST-31.)
_____)

ORDER NO. WQ 93-11-UST

BY THE BOARD:

Mission Mortuary (petitioner), seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) rejecting a claim filed by the petitioner which sought reimbursement from the Underground Storage Tank Cleanup Fund (Fund).

Petitioner contends that the statutory requirement that claimants from the Fund have complied with underground storage tank permit requirements should be waived because the tank was not usable after the effective date of the permit requirement and substantial effort would have been required to make the tank system usable for any purpose. For the reasons hereafter stated, we conclude that the permit requirement should be waived because the tank was unusable and closed or decommissioned in a substantial manner before the effective date of the permit requirement. We therefore reverse the Division's Decision.

I. STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

Chapter 6.75 of the California Health and Safety Code, commencing with Section 25299.10, authorizes the State Water

Resources Control Board (State Water Board) to conduct a program to reimburse certain owners and operators of petroleum underground storage tanks for corrective action costs incurred by such owners and operators.¹ Section 25299.77 of the Health and Safety Code authorizes the State Water Board to adopt regulations to implement the program. On September 26, 1991, the State Water Board adopted such regulations. The regulations, hereafter referred to as Cleanup Fund Regulations or Regulations, are contained in Chapter 18, Division 3, Title 23 of the California Code of Regulations and became effective on December 2, 1991. Among other things, the Cleanup Fund Regulations provide for submittal of reimbursement claims to the State Water Board by owners and operators of petroleum underground storage tanks, for acceptance or rejection of these claims by staff of the State Water Board, and for appeal of any discretionary staff decisions to the State Water Board.

Petitioner submitted a reimbursement claim to the Division. The site involved is owned by petitioner, Mission Mortuary, a corporation whose officers and majority shareholders are Forrest and Mary Halstead. The site is located at 450 Camino El Estero, Monterey, California. The previous owners of the site had installed a 150-gallon underground storage tank in approximately 1947.

When the petitioner purchased the property in 1977, petitioner was not aware of the existence of the underground

¹ Unless otherwise indicated, all statutory references in this Order are to the California Health and Safety Code.

storage tank. In the year following the purchase, Francis Varozza (one of the former owners who had installed the tank) informed petitioner that the tank was installed for the sole purpose of refueling mortuary vehicles, that it was used for a short time only and that it had been emptied and abandoned in the late 1940s. The dispensing pump and the tank itself were left in place until 1991. The handle to the dispensing pump was frozen in place. The cap to the fill pipe was rusted in place. Petitioner has submitted documentation showing that making the tank system operational and bringing the system into regulatory compliance would have required a significant amount of effort and would have been extremely costly.

In 1991, petitioner placed the site involved on the market and a prospective buyer expressed concern about the existence of an underground storage tank. Petitioner had the tank removed on December 20, 1991. The Underground Storage Tank removal and soil evaluation report dated April 24, 1992 indicates that residual product was removed from the bottom of the tank. Contamination was detected during tank removal activities and the application indicates that petitioner has expended \$12,000 in corrective action costs and anticipates spending anywhere from \$400,000 to \$450,000 in additional clean-up costs.

The petitioner did not obtain a permit to own or operate an underground storage tank as required by Section 25284 of the Health and Safety Code. Petitioner's claim was therefore rejected by the Division on the grounds of permit noncompliance.

II. CONTENTIONS AND FINDINGS

Contention: The petitioner acknowledges that the permit required by Section 25284 of the Health and Safety Code was not obtained prior to January 1, 1990. Section 2811(a)(2) of the Cleanup Fund Regulations allows for a waiver of the permit requirement where the claimant can demonstrate that the circumstances are such that it would be inequitable or unreasonable to enforce the permit requirement against the claimant. Petitioner contends that the circumstances of this case are such that it would be unfair and unreasonable to enforce the permit requirement against the petitioner.

The facts relied upon by petitioner in support of its contention can be summarized as follows.

Petitioner was not aware of the existence of the tank when petitioner purchased the property in 1977. When petitioner became aware of the tank in approximately 1978, petitioner did not intend to use it, and, in fact, petitioner could not have used it without having exerted a significant amount of effort and incurring substantial expense. A former owner of the mortuary informed petitioner that the tank had not been used since the late 1940s. Petitioner argues that petitioner was not, in fact, aware of the applicable permit requirements and that since petitioner was not in the petroleum industry, it was not a recipient of trade publications which would have notified petitioner of the law surrounding underground storage tanks. Petitioner further asserts that even if petitioner had been aware of the requirements, it is questionable whether petitioner would

have thought that the requirements applied to its antiquated, unusable tank. Based on these facts, petitioner argues that it would be inequitable and unreasonable to enforce the permit requirement against the petitioner so as to deprive petitioner of access to the Fund.

Finding: The State Water Board's approach to the permit requirements of Section 25284(a) of the Health and Safety Code is reflected in Section 2811(a)(2) of the Cleanup Fund Regulations and the Lloyd Order. (In the Matter of the Petition of Lloyd Properties, Order No. WQ 93-1-UST.) Section 2811(a)(2) of the Regulations provides for waiver of the permit requirement where it would be unreasonable or inequitable to impose the permit requirements on a particular claimant.

In the Lloyd Order, the State Water Board indicated that the fact that a claimant did not know of and was not notified of the Section 25284 permit requirement is not a sufficient reason to waive the statutory permit requirement contained in Section 25284. The State Water Board concluded that this was true whether or not the claimant can be classified as a member of the petroleum industry, and even if the claimant proceeded promptly and appropriately when the claimant became aware of the permit requirement.

The Lloyd Order does, however, identify a number of situations which the Division has held sufficient to justify relief from the permit requirements. Situations which have been held sufficient to justify relief from the permit requirement include:

"Situations where the tanks were closed or decommissioned in some substantial manner prior to January 1, 1984, so that the tanks could not be used after that date without significant effort to reopen the tanks, so long as the tanks were not in fact used after January 1, 1984." (Lloyd Order, page 9.)

At this point, it is appropriate to discuss the rationale behind this approach. Prior to January 1, 1984, there were no formal state requirements for closure of tanks. The Division took the position that the requirements imposed by Chapter 6.7 of the Health and Safety Code should not be imposed retroactively. Persons who closed their tanks prior to January 1, 1984, in a manner which did not violate then-existing law should not be held to the permit requirements of Chapter 6.7. Therefore, a claimant will not be denied access to the Fund because of permit noncompliance if it is shown the tank involved was decommissioned prior to January 1, 1984 and not used thereafter.

A closed or decommissioned tank should be distinguished from a tank which is simply no longer used. As we observed in the Lloyd Order, the fact that a tank was not used for its intended purpose after the 1984 effective date of the permit law does not make it unreasonable or inequitable to require compliance with the permit requirement:

"Section 25298 of the Health and Safety Code requires that tanks which are taken out of operation comply with all permit, inspection and monitoring requirements, unless the tanks are properly closed. The requirement for proper closure includes a demonstration that all residual amounts of any petroleum . . . stored in the tank have been removed, that the site has been investigated to determine if there have been any releases, and that any appropriate remedial action has

been taken. These requirements serve to avoid or reduce the extent of releases [from] inactive tanks. The owner of an inactive tank who promptly [closed] the tank after the permit requirement was enacted, and completed any necessary cleanup before the Fund was created, would be ineligible for reimbursement from the Fund. . . . [Where a] petitioner did not comply with either the permit requirement or the closure requirement until after January 1, 1990, it is not inequitable to hold petitioner responsible for compliance with the permit requirement." (Lloyd Order, page 12.)

The Division takes the position that a decommissioned tank is a tank that can have neither inputs or withdrawals. That is to say, situations where a dispensing pump had been removed but the fill pipe left in place is not considered decommissioned because product can still be placed into the tank without any difficulty. Holding otherwise would excuse the permit requirement and allow access to the Fund by persons who should not participate therein. For example, owners and operators of service stations who failed to obtain a permit as required by Section 25284 of the Health and Safety Code would be allowed access to the Fund if they had removed the dispensing pump prior to 1984. This would not be a reasonable result. Such persons should have been aware of the permit requirements of Section 25284 and should have obtained a permit or at least applied for one by January 1, 1990.

Petitioner maintains that the pump handle was frozen in place and, as a result, tank withdrawals were impossible. By letter dated March 8, 1993, Gen Tech Environmental, the contractor that actually removed the pump system and tank, confirmed that the hand pump connected to the tank was

unusable. The petitioner has indicated that the cap to the fill pipe was rusted in place and asserts that placing product into the tank would have required a substantial amount of effort. The petitioner did not use the tank for any purpose after January 1, 1984. We accept and approve of the Division's position that a tank should not be closed or decommissioned in a substantial manner unless placing product into and withdrawing product from the tank would require a significant amount of effort.

Petitioner has provided sufficient evidence supporting the fact that both the dispensing and the input mechanism were substantially closed thereby rendering the tank usable.

Accordingly, the State Water Board finds that the tank involved was closed or decommissioned in a substantial manner prior to January 1, 1984 and that the permit required by Section 25284 of the Health and Safety Code should not be imposed on petitioner.

III. SUMMARY AND CONCLUSIONS

1. Where a permit or permits are required pursuant to Chapter 6.7, Division 20, of the California Health and Safety Code, access to the Fund is limited to those claimants who obtained or applied for such permit or permits not later than January 1, 1990, unless the claimant can demonstrate that obtaining or applying for the required permit or permits was beyond the reasonable control of the claimant or that it would be unreasonable or inequitable to impose the permit requirement against the claimant.

2. An assertion by a claimant that the claimant did not obtain or apply for the necessary permit because the claimant

was not aware of the permit requirement or was not notified of the permit requirement by a governmental agency is not adequate for relief from the permit requirement imposed by Section 25284(a) of the California Health and Safety Code.

3. For purposes of waiving the permit requirement imposed by Section 25284 of the Health and Safety Code and allowing access to the Fund because the tank was decommissioned in some substantial manner prior to January 1, 1984, it must be shown that the tank was not usable for any purpose and that placing product into and withdrawing product from the tank would have required a substantial amount of effort.

4. In this case, where the tank had not been used since the late 1940s, where the pump handle was frozen in place, where the cap to the fill pipe was rusted in place, where the petitioner was in a field totally unrelated to the petroleum industry, and where the petitioner submitted documentation supporting the fact that making the tank system usable for any practical purpose would have required a great amount of effort and money, it would be inequitable to preclude access to the Fund on the ground of permit noncompliance.

5. This order is limited to the specific facts of this case, that is to the facts indicated in the preceding paragraph.

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IV. ORDER

IT IS THEREFORE ORDERED that the final Decision of the Division rejecting the present claim of the petitioners, Claim No. 6522, is reversed and this matter is remanded to the Division for further proceedings not inconsistent with this order.

CERTIFICATION

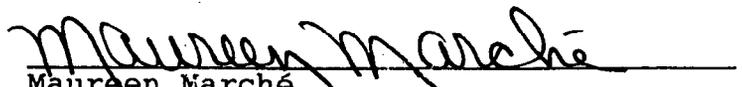
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 19, 1993.

AYE: John Caffrey
Marc Del Piero
James M. Stubchaer
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board